XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(24)

आदेश पत्रक

मामला क्रमांक Cr.A-No 1090/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

SB: HON'BLE SHRI DHIRENDRA MISHRA, J.

APPELLANTS

1. Sukhdev Ram, son of Rati Ram Urano, aged about 49 years, occupation: Agriculturist, resident of village Nandamali, Bhodapara, Police Station Darima, Distt. Surguja (C.G.)
2. Shrinarayan, Son of Sukhdev Ram, aged about 32 years, occupation Agriculturist, resident of village Nandamali, Bhodapara, Police Station, Darima, District Surguja (C.G.)
3. Tapeshwari Ram, son of Sukhdev Ram, aged about 30 years, occupation Agriculturist, resident of village Nandamali Bhodapara, Police Station Darima, Distt. Surguja (CG)
4. Pilibai, wife of Sukhdev Ram, aged about 47 years, occupation Housewife, resident of village nandamali, Bhodapara, Police Station Darima, Distt. Surguja (CG)
5. Mohar Mani, wife of Ramdev Ram, aged about 28 years, occupation Housewife, resident of village Badedamali, Police Station Darima, District Surguja (CG)
6. Heera Mani, wife of Saltu Urano, aged about 30 years, occupation Labourer, resident of village Damali, Police Station Darima, Distt. Surguja (CG)

Vs.

RESPONDENT

State of Chhattisgarh, through Police Station Darima, District Surguja (C.G.)

7-9-2007

Shri V.K. Pandey, Advocate for the appellants.

Shri G.K. Beriwal, Addl. Public Prosecutor, for the State.

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(25)

आदेश पत्रक

मामला क्रमांक Cr. A. No. 1090/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 2	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	2. This appeal is directed against the judgment of conviction and order of sentence dated 15-12-2004 passed in S.T. No. 245/2004 whereby learned 5th Additional Sessions Judge (FTC), Ambikapur has convicted the appellants and sentenced them under Section 148 and Section 304 Part II read with Section 149 of I.P.C. and sentenced each of them to undergo R.I. for 8 months and 7 years respectively. Accused Shrinarayan, Heeramani Bai and Tapeshwari have also been convicted for offence under Section 323 of I.P.C. and sentenced to undergo R.I. 6 months. All the sentences are directed to run concurrently. 3. As per the prosecution case, Jaduram (P.W. 1) lodged report of Ex. P-19 in P.S. Darima, District Surguja on 14-4-2004 mentioning therein that on 13-4-2004 at about 8 P.M. they were celebrating Paska festival in the house of his uncle Jagdish, at that time, the accused persons came to the house of his uncle and started blaming him and his elder brother Tullu (since deceased) that they called them sorcerer and thereafter all of them caught him and dragged him to the threshing field of Sukhdeo and started assaulting with lathi, axe and fists. He shouted for rescuing whereupon his elder brother Tullu rushed there and tried to intervene. At that time, they also started assaulting him by lathi and axe. Hearing the noise his father Nadhiyadas, his wife, his Bhabhi and his uncle Jagdish reached there and intervened. He has sustained injuries over his head, left wrist and on his back whereas his brother Tullu has sustained injury over his head, hand, chest and back and blood was oozing and Tullu died while he was being taken to hospital in front of the house of Kushal Uraon.	

देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(26)

आदेश पत्रक

मामला क्रमांक Cr.A.No. 1090/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

4. During investigation, inquest over the dead body of Tullu was prepared vide Ex. P-16, spot map of Ex. P-20 was prepared. Dead body of Tullu was sent for autopsy to Government Hospital, Ambikapur where Dr. F.H. Firdosi (P.W. 9) conducted post mortem and submitted his report of Ex. P-29. Complainant Jaduram was also sent for medical examination to P.H.C. Darima where doctor examined him and his injury report is Ex. P-31. On the basis of the memorandum of accused persons of Ex. P-2 to Ex. P-7, axe was seized from Sukhdev, Pilibai and Shrinarayan vide Ex. P-9, P-10 and P-12 whereas lathis were seized from Tapeshwari Ram, Moharmani and Heeramani vide Ex. P-11, P-13 and Ex. P-14.

5. After completing the investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Ambikapur who in turn committed the case to the Sessions Judge, Ambikapur from where learned Additional Sessions Judge received the case on transfer for trial.

6. During trial, 9 witnesses were examined. The accused persons in their statements under Section 313 of Cr.P.C. denied the circumstances appearing against them in the prosecution case and submitted that they are innocent and have been falsely implicated. However, the trial Court after hearing the learned counsel for the parties convicted and sentenced the appellants as mentioned above.

7. Learned counsel for the appellants submits that no specific allegation has been made against any of the accused persons about any overt act of assault on the deceased and the witnesses have made omnibus allegations that they reached the house of Jagdish

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(27)

आदेश पत्रक

G.A No. 1090/04

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 4	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

armed with axe and lathi, they were offered liquor and all of a sudden dispute arose between them on the pretext of practicing witchcraft and thereafter they started assaulting firstly to Jaduram and when Tullu came to mediate, he was also assaulted by them. He further submits that there is no evidence that accused persons reached there with a common object of assaulting the deceased or the complainant as from the evidence available on record, it would be evident that the dispute arose all of a sudden on a spur of moment when after consuming liquor, they were engaged in verbal duel regarding calling them sorcerer.

8. On the other hand, learned counsel for the State supports the impugned judgment.

9. I have heard the learned counsel for the parties. I have perused the record of the trial Court as also the impugned judgment.

10. P.W. 9 Dr. F. H. Firdosi who has conducted post mortem over the person of the deceased has found a lacerated wound of size 4 cm x 1 cm x 1 cm placed over left side of temporal region, beneath the above injury blood was clotted. He found that the bone of left temporal region was depressed and fractured and size of injury was described as 2 x ½". He also observed that the brain under the left temporal part was damaged and blood was clotted and size of injury has been described as 6 x 3" and no other injury has been found. It has been opined that the cause of death was grievous injury over the head which was caused 24 hours before the post mortem. The injury was ante mortem in nature and the same was caused by hard and blunt object. The weapons of offence seized from the accused persons

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(28)

आदेश पत्रक

मामला क्रमांक Cr. A. No. 1090/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 5	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

were examined by him and he opined that the injury received by Tulluram could be caused by the above weapons. Thus homicidal death of Tulluram is established.

11. P.W. 1 Jaduram is injured eye-witness. He has sustained lacerated wound over the right side of his head (parietal region) of size 2" x1/2"x1/2", a contusion over left side of back and another contusion - over left elbow of size ½"x ½". The injury report of Jaduram has been admitted by the accused persons under Section 294. This witness has stated that he identifies the accused persons as also the deceased Tulluram who is his brother. The incident is of 5 months back. His Bhabhi Rujhani was sick, upon which they apprehended that she is victim of witchcraft, on account of this, the accused persons armed with lathi and axe came in the night while they were sitting in the home and started assaulting. Shrinath assaulted him over his head, stomach and leg, Heeramani pulled his hairs whereas accused Tape assaulted him over his leg. Rest did not assault him. Thereafter all together assaulted Tulluram. Who assaulted with what weapon, he could not see. After assaulting, the accused persons fled from there. Apart from his family members, Shiva had also seen the incident. He and his brother were going to hospital, however his brother fell on the way and died. In the cross-examination, he has admitted that the accused persons are close relatives and the house of accused persons is situated some 2 Furlangs from his house. It is true that on the date of incident they were celebrating Paska Festival and it is also true that on the eve of festival, they consume liquor and in the influence of liquor they sing and dance and on the date of incident, he and Tullu had consumed

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

(29)

मामला क्रमांक CG-A No. 1090/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 6	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

liquor and while they were present in the house of Jagdish, accused persons reached there and Jagdish offered the accused persons liquor. In para 4 he has further stated that at this time on the pretext of practicing witchcraft a dispute ensued between them, however he has denied the suggestion that there was scuffle between them as a result of which Tullu fell on the peg and he sustained injury. He has stated that when the accused persons came in the house of Jagdish, Sukhdev and Pilibai were holding axe and rest persons were holding lathi.

12. P.W. 2 Nadhiya Ram is a witness of the fact that Tulluram and Jaduram sustained injury and they were injured and Jadu told him that accused persons beat him and Tullu died on way while he was being taken to hospital.

13. P.W. 3 Jagdish has not supported the case of the prosecution and has turned hostile. P.W. 4 Laxmi Bai is wife of deceased Tulluram. She has stated that they had gone to the house of Jagdish on the eve of festival to consume liquor. At that time, the dispute arose and Sukhdev took Jaduram towards threshing field and started assaulting him by axe. When Tulluram went there to mediate, all of them assaulted him. Sukhdev was having axe. Rest of the accused persons were having lathi. Her husband sustained injury over his head. She rescued her husband however he died while he was being taken to hospital. P.W. 5 Shiva has also deposed in the same line.

14. The trial Court relying upon the statement of complainant Jaduram (P.W. 1), Rujhani Bai (P.W. 4) and Shiva (P.W. 5) has

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

(30)

मामला क्रमांक C.A-No. 1090/04 सन् 200

.....विरुद्ध.....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 7	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

convicted all the appellants under Section 148 and Section 304-II read with Section 149 of I.P.C. and has also convicted appellants Shrinarayan, Heeramani Bai and Tapeshwari under Section 323 of I.P.C. for causing simple hurt to complainant Jaduram.

15. It is settled law that the essential ingredients necessary to constitute an unlawful assembly must be present in cases falling under Seetion 148 of I.P.C. and in the absence of any satisfactory evidence to prove the formation of an unlawful assembly with a common object to commit crimes the accused though more than five in number can only be held liable for their individual acts and not collectively.

16. In the instant case, from the statement of witnesses particularly the statement of injured witness P.W. 1 Jaduram, it is evident that the complainant party had gathered in the house of their relative on the eve of festival and there they were consuming liquor. The accused persons who are also near relatives of the complainant party also reached there and they were also offered liquor by the host Jagdish and during this time, the dispute ensued between them in connection with practicing witchcraft. Even Laxmi Bai (P.W. 4), wife of the deceased has stated that on the eve of festival they had gathered in the house of Jagdish for consuming liquor. When dispute arose, Sukhdev took Jaduram towards threshing field and there he assaulted him and when her husband Tulluram went there to mediate, all of them assaulted him. Thus from the evidence available on record, it is clear that the persons had gathered for consuming liquor. There is no evidence that the accused persons constituted

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

(31)

मामला क्रमांक Cr. 1090/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 8	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

unlawful assembly and with intention to commit crime they went to the house of Jagdish. Complainant Jaduram was taken aside by appellant Sukhdev to the threshing field which is at a distance of 360 ft. as per site plan of Ex. P-20 and Sukhdev alone assaulted Jaduram with an axe according to Rujhani Bai and accused Shrinarayan, Heeramani Bai and Tape as per version of Jaduram. When Tulluram went there for mediation, the allegation is that all of them assaulted him. In these circumstances, conviction of the appellants under Section 148 of I.P.C. cannot be sustained.

17. The appellants have been convicted under Section 304 Part II read with Section 149, I.P.C. The learned trial Court in para 13 of the impugned judgment has held that the appellants and the complainant had gathered in the house of Jagdish for eating and drinking to celebrate festival on the basis of statement of the host Jagdish. As already mentioned, the dispute erupted all of a sudden under the influence of liquor and therefore, in the opinion of this Court, there was no evidence available on record before the trial Court to reach to the conclusion that the appellants formed unlawful assembly in prosecution of their common object of assaulting the deceased Tulluram. In these circumstances, the appellants could not be convicted with the aid of Section 149 of I.P.C. in the absence of any evidence regarding common object of assaulting Tulluram and each of them could be held liable for their individual acts and not collectively. The Apex Court in the matter of **State of Punjab –v- Sanjiv Kumar and others** reported in **AIR 2007 SC 2430**, in para 8 has held thus:-

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(32)

आदेश पत्रक

मामला क्रमांक Cr. A. No. 1090/04 सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 9	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

"8. The pivotal question is applicability of Section 149 I.P.C. Said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuatd by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of the acts which fall within the purview of Section 141. The work 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. I other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may be

(33)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr-A-No. 1090/04 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly."

18. None of the witnesses have stated the role played by each of the appellants in assaulting Tulluram and there is general and omnibus allegation against all the accused persons that after Jaduram was assaulted with axe, the deceased Tulluram came there to mediate and at that time all of them altogether assaulted Tulluram. P.W. 1 Jaduram has stated that on the date of incident, they were sitting in the house of Jagdish when accused persons came there armed with lathi and axe and started assaulting while

XI-HC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(34)

मामला क्रमांक Cr.A.No.1090/04 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 11	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

they were sitting in the house whereas in the F.I.R. the place of incident is shown as threshing field of Jagdish which is at a distance of 360 ft from the house of Jagdish. P.W. 4 Rujhani Bai has given a different version and she has stated that Sukhdev took Jaduram towards the threshing field and there he assaulted him with axe and when Tulluram went there, he was assaulted by all and the distance of threshing field is one furlang. P.W. 5 Shiva has also stated that lady accused persons were armed with lathi whereas male appellants were holding axe. They took Jaduram and Tullu to the threshing field of Sukhdev and they all assaulted both of them together. However this witness has also not stated about individual role played by each of the accused persons. The trial Court in para 17 of the impugned judgment has observed that the prosecution witnesses have failed to depose as to which of the accused persons assaulted deceased Tulluram by what weapon and on what part of his body. However since offence is committed in prosecution of common object, all the members are to be considered as members of unlawful assembly and accordingly each of the accused persons have been convicted with the aid of Section 149, I.P.C. and accordingly convicted all of them under Section 304 part II read with Section 149 of I.P.C.

19. From the evidence available on record, it is evident that both the parties had gathered in the house of Jagdish to celebrate festival and after consuming liquor, a dispute arose in connection with allegation of practicing witchcraft by the accused party and thereafter the complainant and the deceased were taken by one of the accused to a distant place and there incident of assault occurred and taking into consideration that there is no specific allegation

XI-HC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(35)

मामला क्रमांक ..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

against any individual appellant and all the accused persons have been roped in the offence with the omnibus allegations that the accused persons started assaulting Tulluram together, conviction of the appellants under Section 304 Part II read with Section 149 cannot be sustained. However taking into consideration the evidence of P.W. 1 Jaduram, conviction of the appellants Shrinarayan, Heeramani and Tapeshwari Ram under Section 323 of I.P.C. and sentence imposed under that section are maintained.

20. Accordingly, the appeal is partly allowed. Conviction of the appellants under Section 148 and Section 304 Part II read with Section 149 of I.P.C. and sentences imposed under those sections are set aside. However conviction of appellant Shrinarayan, Heeramani Bai and Tapeshwari under Section 323 of I.P.C. and sentence to undergo R.I. six months are maintained.

Sd/-
DHIRENDRA MISHRA
Judge